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CITATIONS

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-678

EXECUTIVE JET AVIATION, INC., ET AL., *Petitioners*

v.

CITY OF CLEVELAND, OHIO, ET AL., *Respondents*

REPLY BRIEF FOR PETITIONERS

Petitioners Executive Jet Aviation, Inc. and Executive Jet Sales, Inc.[1] submit the following in reply to the arguments made and the authorities cited in the Briefs of respondents City of Cleveland, Ohio, and Phillip A. Schwenz,[2] and respondent Howard E. Dicken.[3]

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[1] Hereinafter petitioners will be referred to collectively as "EJA."

[2] Hereinafter referred to collectively as "the City."

[3] Hereinafter referred to as Dicken.

I. RESPONDENTS' EFFORTS TO RECONCILE THE SIXTH CIRCUIT'S DECISION IN THIS CASE WITH THE THIRD CIRCUIT'S CONFLICTING DECISION IN WEINSTEIN ARE UNAVAILING

Briefly stated, respondents' position is that certiorari should be denied in this case because there is no conflict between the Sixth Circuit's decision herein and the decision of the Third Circuit in *Weinstein* v. *Eastern Airlines, Inc.*, 316 F.2d 758 (3d Cir.), *cert. denied*, 375 U.S. 940 (1963). They argue that the question involved in the two cases—the situs of the tort—is a factual one and that the facts in this case are "diametrically opposite"[4] to the facts which were before the Third Circuit in *Weinstein*. Therefore, they argue, "Further review of this factual determination is not warranted."[5] In support of these arguments the City cites selected passages from the Record in the *Weinstein* case on file in the Third Circuit.

The question involved in this case is legal, not factual. It was succinctly stated by Circuit Judge Edwards in his dissenting opinion as follows:

> Do the federal courts have maritime jurisdiction over airplane crashes in navigable waters where the cause of the crash is alleged to be tortious conduct which occurred on land? (App. A, p. 8a)

That statement should be compared with the "Statement of Question Involved" presented to the Third Circuit by the appellants in the *Weinstein* case:

> Where an airplane crashes into maritime waters, does it not give rise to a maritime tort, so that

[4] Brief for Respondents The City at 5.

[5] Brief for Respondent Dicken at 3.

a federal court sitting in admiralty, has jurisdiction to determine the action?[6]

No one could seriously argue that the facts of this crash are "diametrically opposite" to the facts of the Boston Harbor crash which gave rise to the *Weinstein* litigation. In both instances land-based aircraft took off from airports located near navigable water; both aircraft met a flight of birds while still over the runway; both ingested birds into their jet engines; many dead birds were found on both runways; and in both cases the ingestion of the birds over land caused the jet engines to flameout and the aircraft to descend and crash into nearby navigable water. Compare the statement of the pilots in this case[7] with the facts of the Boston Harbor crash as reported in *Rapp* v. *Eastern Air Lines, Inc.*, 264 F. Supp. 673 (E.D. Pa. 1967).

Respondents do argue, however, that the Third Circuit was apparently unaware of the fact that the cause of the Boston Harbor crash was bird ingestion into the engines on takeoff. And they imply that had the Third Circuit known of this fact *Weinstein* would have gone the other way under the authority of the "controlling" workmen's compensation cases cited by them. It is only necessary to look at those portions of the *Weinstein* record on file in the Third Circuit which were *not* cited to this Court by respondents to see how specious this argument is.

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[6] Consolidated Brief and Appendix for Appellants in *Weinstein* v. *Eastern Airlines, Inc.*, United States Court of Appeals for the Third Circuit, Nos. 14023-14029, at 1. Hereinafter cited as "Brief for Appellants— *Weinstein.*"

[7] Petitioners' Brief for Certiorari at 4-6.

The libel which was before the Third Circuit in Weinstein read as follows:

> 8. On or about October 4, 1960, libellant's decedent was a passenger for hire in a certain Lockheed Electra Airplane N5533, owned, operated, possessed and controlled by Eastern Airlines, Inc., as a common carrier on a regularly scheduled flight to Philadelphia and points south, designated as Flight No. 375, which had departed from the Logan International Airport in Massachusetts at approximately 4 p.m.
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> 9. Shortly after the said aircraft had become airborne, following takeoff from the said airport, *by reason of the negligence of the respondents,* and each of them, and by virtue of their respective breaches of warranties said aircraft *crashed into the navigable waters of Boston Harbor, causing libellant's decedent to suffer severe and disabling injuries resulting in his death.*
>
> 10. The respondent United States of America, through its various agencies including the Civil Aeronautics Administration, Civil Aeronautics Board and Federal Aviation Agency, through their respective agents, servants, workmen and employees, was careless and negligent under the circumstances, and by reason thereof proximately caused the injuries and death of the libellant's decedent, under the circumstances, in and by:
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> * * *
>
> (f) *failing to take prompt, proper and adequate measures to meet the problem of bird ingestion by planes using said airport and to re-*

quire proper and adequate measures to be taken to protect against said hazard;

(g) *failing to exercise proper and adequate control over take-off of the aforesaid aircraft;*

* * *

15. The aforesaid crash and resulting injury and death of the libellant's decedent were caused by the carelessness and negligence of the respondent Lockheed Aircraft Corporation by its agents, servants, workmen and employees, under the circumstances in:

* * *

(c) *failing to properly and adequately test the power plants,* the various component parts, control devices and instrumentations thereof incorporated into said aircraft *for bird ingestion;*

(d) *failing to properly and adequately design, equip, test, alter, repair and replace air intakes,* instrumentation and controls over power plants of said aircraft to *permit safe take-off under circumstances where birds might be encountered.*

* * *

17. Solely by reason of the carelessness and negligence of the respective respondents, as aforesaid, and the breach of warranties by each of them, as set forth hereinabove, *libellant's decedent was caused to suffer painful and severe injuries and to wage an unsuccessful struggle for survival, as a consequence of which he succumbed to his injuries and/or the elements, including the waters of the harbor in which the plane had crashed, and died therefrom.*

* * *

> 24. All and singular, the premises are true and within the admiralty and maritime jurisdiction of the United States and this Honorable Court.
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> (Brief for Appellants—*Weinstein* at 5a-14a emphasis added.)

It can thus be seen that in *Weinstein,* as here, the court of appeals was faced with a complaint which alleged that land-based negligence, consisting among other things of a failure to take the precautions necessary to prevent the hazard of bird ingestion by planes during takeoff and to control adequately the aircraft's takeoff, caused injuries and death in the navigable waters into which the plane crashed.

Faced with that question the Third Circuit said, "If the tort occurred on navigable waters, the claim is one that lies within the jurisdiction of the courts of admiralty; nothing more is required." 316 F.2d at 761. It then concluded:

> We hold, therefore, that tort claims arising out of the crash of a land-based aircraft on navigable waters within the territorial jurisdiction of a state are cognizable in admiralty. (316 F.2d 766)

Under respondents' view of the law as urged in this case the Third Circuit, *on the record before it in Weinstein,* would have *had* to conclude that the negligence there alleged—the failure of the defendants to prevent hazards to aircraft from bird ingestion—became operative *when the birds were ingested into the aircraft's engines over land;* and that the situs of the tort was therefore over land. In actual fact, the Third Circuit correctly followed the applicable law as announced by this Court in *The Plymouth,* 70 U.S. (3 Wall.) 20 (1865),

and *Atlantic Transport Co.* v. *Imbrovek,* 234 U.S. 52 (1914), and found that the tort was a maritime one. EJA submits that the conclusion reached by Judge Edwards in his dissenting opinion in this case is inescapable. He said, "I believe that the facts of this case require us to accept or reject *Weinstein, supra,* and thus to decide for this Circuit whether air ships, which are increasingly displacing water-borne ships in maritime commerce, are within the maritime jurisdiction *when they crash on navigable waters.*" (App. A, p. 11a, emphasis added.)

In truth, there is no valid way to reconcile the decision in this case with the *Weinstein* holding. The conflict is direct and irreconcilable. Certiorari should be granted to resolve it and to bring about uniformity of decisions among the federal courts of appeal on this important matter of federal law.

II. THE DECISIONS OF THIS COURT APPLICABLE TO THIS CASE ARE THE PLYMOUTH AND ATLANTIC TRANSPORT CO. v. IMBROVEK, NOT THE WORKMEN'S COMPENSATION CASES RELIED UPON BY RESPONDENTS

Respondents contend that this case is controlled by three cases from this Court: *Smith & Son* v. *Taylor,* 276 U.S. 179 (1928); *Minnie* v. *Port Huron Terminal Co.,* 295 U.S. 647 (1935); and *The Admiral Peoples,* 295 U.S. 649 (1935). The test, they say, was correctly stated by Circuit Judge McCree in his concurring opinion written in this case. Judge McCree said:

> The rule, as I understand it, is that the situs of the tort is where the negligence becomes operative, *not where the damages, or the major portion of them, are sustained.* (App. A, p. 7a, emphasis added.)

EJA submits that the workmen's compensation cases relied upon by respondents are inapplicable here, and

that the above statement of the "locality test" is incorrect.

In *The Plymouth,* 70 U.S. (3 Wall.) 20 (1865), negligence committed on board a ship tied up to a wharf in Chicago caused a fire on board ship which spread to the wharf and surrounding buildings. A libel was filed against the owners of the vessel to recover for the damage done to the wharf and buildings. This Court held that the tort involved was not a maritime one and the case not cognizable in admiralty. It said:

> It will be observed, that the *entire damage complained of* by the libelants, as proceeding from the negligence of the master and crew, and for which the owners of the vessel are sought to be charged, occurred, not on the water, but on the land. The origin of the *wrong* was on the water, but the substance and consummation of the *injury* on land. It is admitted by all the authorities, that the jurisdiction of the admiralty over maritime torts depends upon locality—the high seas, or other navigable waters within admiralty cognizance; . . .
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> * * *
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> They [maritime torts] are cases of personal wrongs, which commenced on the land; such as improperly enticing a minor on board a ship and there exercising unlawful authority over him. The substance and consummation of the wrong were on board the vessel—on the high seas, or navigable waters—*and the injury complete within admiralty cognizance.* It was the tortious acts on board the vessel to which the jurisdiction attached.
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> This class of cases may well be referred to as illustrating the true meaning of the rule of locality in cases of marine torts, namely: that the *wrong and injury* complained of must have been committed *wholly* upon the high seas of navigable

> waters, or, at least, the substance and consummation of *the same* must have taken place upon these waters to be within the admiralty jurisdiction. In other words, the *cause of damage,* in technical language, whatever else attended it, *must have there complete.*
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> * * *
>
> . . . The answer is, as already given; the *whole,* or at least the *substantial* cause of action, arising out of the wrong, must be *complete within the locality upon which the jurisdiction depends*—on the high seas or navigable waters. (70 U.S. at 33-36, emphasis added.)

Thus, it was made clear by this Court in 1865 that the locality rule required that the "injury complained of" be committed *wholly* within the locality upon which the jurisdiction depends. This requirement was referred to again in 1914 in *Atlantic Transport Co.* v. *Imbrovek,* 234 U.S. 52 (1914), when this Court said, "As the *injury* occurred on board a ship while it was lying in navigable waters, there is no doubt that the requirement as to locality was fully met." 324 U.S. at 58, emphasis added. And just a few weeks ago this Court said in *Victory Carriers, Inc.* v. *Law,* — U.S. — (No. 70-54, October Term, December 13, 1971):

> The historic view of this Court has been that the maritime tort jurisdiction of the federal courts is determined by the *locality of the accident* and that maritime law governs only those torts occurring on navigable waters of the United States. (40 U.S.L.W. 4059, 4060; emphasis added.)

The "locality of the accident" in this case is where the aircraft crashed—in the navigable waters of Lake Erie. The "injury complained of" in this case is the total destruction of EJA's plane caused by ditching it

in Lake Erie where it remained submerged in 40 to 45 feet of water for more than two days. The bending done to the fuselage during the ditching, the intensive water soaking given to all electrical components, radios and instruments, and the damage done during salvaging and raising made the aircraft a total loss. (R. 49, 50, 54, 60, 61). EJA's claim is for that total loss; for damages for the loss of use of the aircraft during the period reasonably required to obtain a replacement aircraft; and for salvage, raising and other costs incurred. *This is not a claim for the cost of overhauling two jet engines because of bird ingestion,* which could have been the extent of the damage to EJA's aircraft had this incident occurred on a long runway at an airport surrounded by land rather than on a short runway ending in navigable water. Respondents are fond of referring to EJA's aircraft "coming to rest in navigable waters."[8] The actual facts were more accurately stated by Judge Edwards in his dissenting opinion when he said, "This record makes clear that the impact on the water and the sinking of the plane with its consequent water damage accomplished *the destruction complained of.*" (App. A, p. 25a, n. 4; emphasis added.)

In view of these facts and allegations, and in view of the locality rule as stated in *The Plymouth, supra,* and *Atlantic Transport Co.* v. *Imbrovek, supra,* EJA submits that the court of appeals was in error when it held that the locality of the tort in this case was over land. The reason given, and the argument urged upon this Court by respondents, is that the previously cited workmen's compensation cases control this case.

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[8] Brief for Respondents The City at 1.

Respondents rely heavily on the case of *Smith & Son* v. *Taylor, supra,* to support their contention that it was the initial ingestion of the birds into the jet engines while the aircraft was over land that "gave rise to the cause of action" in this case. 276 U.S. at 182. How important is *Smith & Son* v. *Taylor* as a precedent in 1972, and what are the reasons why the language in that 1928 workmen's compensation case should be applied in future cases where aircraft have crashed in navigable waters?

Respondents would have this Court believe that the solution here is a simple one—the automatic application of the language in *Smith & Son* to the facts of this case. But as Mr. Justice Holmes noted in *The Blackheath,* 195 U.S. 361 (1904), "The precise scope of admiralty jurisdiction is not a matter of obvious principle or of very accurate history." To put *Smith & Son* in its proper perspective, one must review the rather inaccurate history surrounding the maritime workmen's compensation cases. That history has been spelled out in detail by this Court in *Calbeck* v. *Travelers Insurance Co.,* 370 U.S. 114 (1962); *Nacirema Operating Co.* v. *Johnson,* 396 U.S. 212 (1969); and *Victory Carriers, Inc.* v. *Law, supra.* Suffice it to say here, after this Court's decision in *Southern Pacific Co.* v. *Jensen,* 244 U.S. 205 (1917), "many thousands of employees" were deprived of the benefits of workmen's compensation. *Calbeck* v. *Travelers Insurance Co., supra,* at 118. Two attempts by Congress to deal with the situation by legislation were unsuccessful. In 1927, faced with the fact that "for many maritime injuries no compensation remedy was available," Congress "turned to a uniform federal compensation law." 370 U.S. at 120. In that year Congress passed the Long-

shoremen's and Harbor Workers' Compensation Act.[9] As Judge Edwards observed in his dissenting opinion in this case:

> *Smith & Sons* . . . preceded the effective date of federal Longshoremen's Compensation Act and upheld a state compensation award. The holding of the court was to deny that "the case is *exclusively* within admiralty jurisdiction," as appellants therein were claiming. (App. A, p. 15a.)

Today it is extremely doubtful that a case like *Smith & Son* would be brought, as it was in 1928, in a state court under a state Workmen's Compensation Law. It would probably not even be brought under the federal Longshoremen's Compensation Act, but be filed instead in admiralty, against the owner of the vessel claiming unlimited damages caused by the unseaworthiness of the ship.[10] Because of the Admiralty Extension Act[11] passed by Congress in 1948, the claim would undoubtedly be cognizable in admiralty today. See *Gutierrez* v. *Waterman S.S. Corp.*, 373 U.S. 206 (1963); *Victory Carriers, Inc.* v. *Law, supra.*

Circuit Judge John R. Brown put *Smith & Son* and respondents' other cases in their proper perspective in *Pure Oil Company* v. *Snipes*, 293 F. 2d 60 (5th Cir. 1961), a case involving an oil driller who was injured

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[9] 33 U.S.C. §§ 901-950 (1927).

[10] In *Victory Carriers, Inc*, v. *Law, supra*, such a claim was filed by a longshoreman and this Court said:

> . . . What is at issue is the *amount* of the recovery not against a shipowner, but against the stevedore employer. As this case illustrates, the shipowner's liability for unseaworthiness would merely be shifted, with attendant transaction costs, to the stevedore by way of a third party action for indemnity.

[11] 46 U.S.C. § 740 (1948).

while working on a fixed drilling platform in the Gulf of Mexico. The worker in that case fell from a tank on top of the platform, struck the platform deck 15 feet below, dropped through a hole in the platform into the ocean 50 feet below, striking at least two more steel structure members on the way down. The Fifth Circuit discussed *Smith & Son, supra, Minnie* v. *Port Huron Terminal Co., supra* and *The Admiral Peoples, supra.* It then said:

> . . . Many of these refined distinctions are now of historic and academic interest only since Congress cut through many of them by the 1948 Act which extends admiralty and maritime jurisdiction to "all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land." 46 U.S.C.A. § 740. (293 F. 2d at p. 65)

If the refined distinctions of respondents' workmen's compensation cases are "now of historic and academic interest only," why should they be injected into an area which has heretofore been free from "litigation-spawning confusion" because it is "easily susceptible of more workable solutions"? *Moragne* v. *States Marine Lines,* 398 U.S. 375, 40 (1970). Respondents have not cited a *single* case to this Court wherein the "refined distinctions" of *Smith & Son* and respondents' other cases have been applied to determine where an aircraft crashing into navigable waters "first became crippled." That is because there are no such cases. As the court said in *Thomson* v. *Chesapeake Yacht Club, Inc.,* 255 F. Supp. 555, 558 (D. Md. 1965), "The aircraft cases present special problems . . . and the decisions adopt a practical approach." That approach has been, *without exception,* to look at the "locality of

the accident," or crash, which is the "historic view of this Court" insofar as maritime tort jurisdiction is concerned. *Victory Carriers, Inc.* v. *Law, supra.* Respondents have advanced *no* reasons why in aircraft cases this locality of the crash should be complicated by the "refined distinctions" found in *Smith & Son.* There are, on the other hand, extremely good reasons for *not* doing so. As aviation and space technology becomes more sophisticated in the future, supersonic transports and space shuttles will cross coastlines at altitudes many miles above the surface of the earth while traveling at thousands of miles per hour. If such a vehicle crashes in navigable waters, how is a court to determine whether it "first became crippled" over land or sea? In all aviation cases to date the locality of the crash has been the rule, and if the crash occurred on navigable waters the tort was a maritime one; nothing more was required. That has admittedly occurred in this case and the Sixth Circuit's finding that the tort here is a non-maritime one stands alone against all previously-reported aircraft cases.

III. RESPONDENTS' CONTENTION THAT THE FEDERAL AVIATION ACT PRECLUDES THE EXERCISE OF ADMIRALTY JURISDICTION AS TO AIRCRAFT CRASHES IN NAVIGABLE WATERS IS ERRONEOUS

The City argues that EJA's contention that the federal general maritime law is applicable in cases such as this of aircraft crashes in navigable waters "squarely conflicts with the express policy of Congress that the federal interest lies in the orderly and uniform regulation of *all* air commerce under the Federal Aviation Act of 1958 (49 U.S.C. §§ 1301-1542) . . . ."[12]

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[12] Brief for Respondent The City at 13.

This identical argument was made to the Third Circuit by the respondents in *Weinstein* v. *Eastern Airlines, Inc.*, 316 F.2d 758 (3d Cir.), *cert. denied*, 375 U.S. 940 (1963), and it was correctly rejected in toto by that court as erroneous. The Third Circuit said:

> The respondents argue that the Federal Aviation Act of 1958, 49 U.S.C.A. § 1301 et seq. (1962 Supp.), precludes the exercise of admiralty jurisdiction as to aircraft crashes in navigable waters. 49 U.S.C.A. § 1509(a) provides in pertinent part that "[T]he navigation and shipping laws of the United States * * * shall not be construed to apply to seaplanes or other aircraft * * * ." The brief correct answer to this contention is that the Federal Aviation Act is not a statute intended either to create or to limit judicial jurisdiction. "The principal purpose of this legislation is to establish a new Federal agency with powers adequate to enable it to provide for the safe and efficient use of the navigable airspace by both civil and military operations." 1958 Cong. & Admin. News, p. 3741. In Wilson v. Transocean Airlines, 121 F.Supp. 85, 93 (N.D. Calif. 1954), the argument herein urged by the respondents was raised and rejected, the court stating "The term 'navigation and shipping laws' * * * obviously refers to those federal laws specifically governing the navigation and operation of the merchant marine. The term was never intended to include a general admiralty statute * * * ." With reference to the predecessor to the 1958 Act, the Air Commerce Act of 1926, 44 Stat. 568, which contained the same language as the pertinent section in the Federal Aviation Act of 1958, Benedict states: "It will be noted that the Act does not go so far as to deny the existence of admiralty and maritime jurisdiction generally over aircraft * * * ." 1 Benedict, Admiralty § 58, at pp. 118-119 (6th ed.). See also Choy v. Pan American Airways, 1941 A.M.C. 483, 485 (S.D.N.Y.). (316 F.2d at 765, 766.)

CONCLUSION

By reason of all the authority and arguments in EJA's Petition for a Writ of Certiorari and in this Reply Brief, EJA submits that this petition for writ of certiorari should be granted.

Respectfully submitted,

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January 21, 1972